Nos. 78 and 106

In the Supreme Court of the United States

OCTOBER TERM, 1970

ATLANTIC CITY ELECTRIC COMPANY, ET AL.,
APPELLANTS,

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, ET AL.

ALABAMA POWER COMPANY, ET AL., APPELLANTS,

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK AND THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	3
Argument	15
Introduction	15
Summary	18
I. The Commission's endorsement of the general rate level is directly reviewable	23
A. The Commission's decision as to costs, revenue needs and the reasonableness of the general rate level was final agency action ripe for judicial review	23
B. The statutory scheme for challenging particular rates is no bar to direct judicial review of this across-the-board decision	30
C. The possibility that interlocutory relief might be given pending judicial review is no reason for denial of review; any such relief should be given sparingly and in such a manner as to protect the interests of both railroads and shippers	39
II. The Commission's consideration of the allocation of the general rate increase among commodities was not sufficiently final to warrant judicial review at the present time	41
III. Procedural considerations	49
Conclusion	52
Appendix (statutes involved)	53

CITATIONS

Cases:

	Page
Abbott Laboratories v. *Gardner*, 387 U.S. 136	11, 19, 28, 32, 37, 38, 39, 47, 50
Algoma Coal and Coke Co. v. *United States*, 11 F. Supp. 487	11, 13, 20, 36
Arizona Grocery Co. v. *Atchison T. & S. F. Ry. Co.*, 284 U.S. 370	9
Association of Data Processing Service Organizations, Inc. v. *Camp*, 397 U.S. 150	28
Avera Packing Co. v. *Atlantic Coast Line R. Co.*, 296 I.C.C. 17	34
Baltimore & O. R. Co. v. *Chicago & E. I. R. Co.*, 318 I.C.C. 771, reversed on reconsideration, 322 I.C.C. 572	34
Barlow v. *Collins*, 397 U.S. 159	28
Braswell Motor Freight Inc. v. *United States*, 297 F. Supp. 215	40
City Bank v. *Schnader*, 291 U.S. 24	32
City of Chicago v. *United States*, 396 U.S. 162	2, 19, 27, 28, 38
Electronics Industries Association v. *United States*, D. D.C. Civ. No. 1059–69, decided April 2, 1970	13
Ex Parte No. 256, *Increased Freight Rates, 1967*, 329 I.C.C. 854; 332 I.C.C. 280	6
Federal Power Commission v. *Interstate Natural Gas Co.*, 336 U.S. 577	41
Florida Citrus Commission v. *United States*, 144 F. Supp. 517, affirmed *per curiam*, 352 U.S. 1021	38
Frozen Food Express v. *United States*, 351 U.S. 40	28
Great Lakes Shipowners Assn., et al. v. *United States, et al.*, D. D.C., No. 1736–70	14
Gully v. *Interstate Natural Gas Co.*, 82 F. 2d 145, certiorari denied, 298 U.S. 688	32
Koppers Co., Inc. v. *Chesapeake & O. Ry. Co.*, 303 I.C.C. 383	33
Koppers Co. v. *United States*, 132 F. Supp. 159	34, 38
Manufacturing Chemists Assn., et al, v. *United States, et al.*, D. D.C., No. 3276–69	14, 40
McKart v. *United States*, 395 U.S. 185	32, 47
New Haven Inclusion Cases, Nos. 914, *et seq.*, 1969 Term, decided June 29, 1970	50

Cases—Continued

	Page
Rochester & Pittsburgh Coal Co. v. *Baltimore & Ohio*, 294 I.C.C. 423	34
Rochester Telephone Corp. v. *United States*, 307 U.S. 125	28, 29
Stott v. *United States*, 154 F. Supp. 389	40
United States v. *Louisiana*, 290 U.S. 70	31, 48
Virginia Petroleum Jobbers Ass'n v. *F.P.C.*, 259 F. 2d 921	40
Statutes:	
Administrative Procedure Act, 5 U.S.C. (Supp. IV) 551, *et seq*	29, 53
701	53
702	29, 53
704	29, 32, 46, 53
705	39, 40, 54
Interstate Commerce Act, as amended, 49 U.S.C. 1, *et seq.*:	
Section 4	5, 29
Section 13	5, 13, 15, 19, 20, 22, 30, 31, 33, 34, 35, 37, 38, 46, 48, 56
Section 13(4)	31
Section 15	5, 13, 37, 46, 57
Section 15(1)	5, 15, 19, 20, 22, 26, 30, 31, 46, 48, 57
Section 15(7)	4, 7, 26, 31, 58
Section 15a(2)	4, 26, 42
7 U.S.C. 1291(b)	10
28 U.S.C. 1336(a)	10, 54
28 U.S.C. 1404(a)	23
28 U.S.C. 2112(a)	49
28 U.S.C. 2284	55
28 U.S.C. 2284(3)	39, 40, 55
28 U.S.C. 2323	10
28 U.S.C. 2324	39, 54
28 U.S.C. 2325	55

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 78

ATLANTIC CITY ELECTRIC COMPANY, ET AL., APPELLANTS,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

No. 106

ALABAMA POWER COMPANY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR THE SOUTHERN DISTRICT OF NEW YORK AND THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES, THE SECRETARY OF AGRICULTURE, AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the district court in No. 78 (App. 153a) is reported at 306 F. Supp. 338. The opinion of

the district court in No. 106 (App. 213a) is unreported. The Interstate Commerce Commission's interim decision (App. 248a) is published at 332 I.C.C. 590, and its final order (App. 281a) is published at 332 I.C.C. 714.

JURISDICTION

The judgment of the three-judge district court in No. 78 was entered on October 28, 1969 (App. 165a), and appellants filed a notice of appeal on December 18, 1969 (App. 166a). The judgment of the three-judge court in No. 106 was entered on December 18, 1969 (App. 220a), and appellants filed a notice of appeal on February 4, 1970 (App. 221a). Probable jurisdiction was noted in each case, and the appeals were consolidated on May 18, 1970. Jurisdiction to review the district courts' judgments is conferred by 28 U.S.C. 1253. *City of Chicago* v. *United States*, 396 U.S. 162.

QUESTION PRESENTED

Whether, and if so to what extent, direct judicial review may be had of Interstate Commerce Commission orders authorizing a general increase in freight rates on the basis of findings, *inter alia*, as to railroad costs and revenue needs and as to the reasonableness of the general rate level.

STATUTES INVOLVED

There are set forth in the Appendix to this brief pertinent portions of the Administrative Procedure Act (5 U.S.C. (Supp. IV) 551(13), 701(a), 701(b)

(2), 702, 704, 705), of the provisions of the Judicial Code relating to review of Interstate Commerce Commission orders (28 U.S.C. 1336(a), 2324, 2325, 2284 (3)), and of the Interstate Commerce Act (49 U.S.C. 13(1), 15(1), 15(7), 15a(1) and (2)).

STATEMENT

These consolidated cases are appeals from judgments of three-judge district courts which dismissed appellants' suits to enjoin and set aside a set of orders of the Interstate Commerce Commission authorizing a general increase in rail freight rates.

On March 7, 1968, the railroad respondents, substantially all of the nation's Class I railroads, jointly filed with the Commission a "Petition for Orders Permitting the Filing of Increased Freight Rates and Charges and for the Relief Necessary to the Assessment of Such Charges" (App. 226). With technical refinements that we shall discuss shortly, the Petition basically asked the Commission to take action so as, "following the receipt and consideration of evidence in the form of verified statements, to permit the actual charging of the proposed increases upon a finding that the general level of rates as increased will be just and reasonable" (App. 227a).

In filing this Petition, the railroads followed the pattern that has become established over many years for seeking relief, as the railroads have from time to time considered it necessary, from the effects of increased costs and corresponding declines in freight earnings. As here, the railroads have in each case

asked the Commission to authorize, in a single proceeding, a general, across-the-board freight rate increase, usually by a stated percentage. The Commission deals with such a proposal in what is referred to as a general revenue proceeding—a formal investigation under Section 15(7) of the Interstate Commerce Act, 49 U.S.C. 15(7), in which the principal issue is whether the railroads' costs and revenue needs justify the proposed rate increases, and accordingly whether the new level of rates will be within a just and reasonable maximum. In making this investigation the Commission examines the financial position of the railroads in the aggregate, considering their operating costs and revenue under the standards of the so-called statutory "rule of rate making", Section 15a(2) of the Act.[1] The Commission may also, in additional "sub-parts" of the general proceeding, examine the effect of the proposed increase in rates upon the "movement of traffic" in particular commodities under the first clause of Section 15a(2), and consider such other matters as in its view are appropriate for preliminary consideration. The result of a general revenue proceeding is a Commission determination—incorporated in a package of

[1] Section 15a(2) reads: "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service." 49 U.S.C. 15a(2).

orders whose technical nature we shall discuss—that the general level of rates as increased will be lawful, with such modifications as the Commission specifically orders. The Commission expressly states—as it did here, App. 283a, 393a—that it is not prescribing particular rates, thus leaving the details open to future challenges by shippers in the normal course under Sections 13 and 15(1) of the Act, 49 U.S.C. 13, 15(1).

Apart from the obvious benefit to the railroads from a prompt Commission determination whether or not the increased general rate level is just and reasonable within the meaning of the Interstate Commerce Act, there are also technical reasons why the railroads seek affirmative Commission action in their favor rather than simply publishing new tariffs subject to possible investigation and suspension, as the law permits. First, since the filing of item-by-item tariffs, as the Commission's regular rules contemplate, is impracticable in the case of an across-the-board increase, the railroads need special permission to file a Master Tariff in short form; in this case, the Commission granted such procedural permission the day after the Petition was filed (App. 245a), and Master Tariff X–259, providing for the proposed increases, was filed on March 11, 1968. Second, affirmative Commission approval is needed in order for the railroads to implement increases in those various particular rates that have been specifically prescribed by the Commission in past rate proceedings under Section 15. Third, special permission under Section 4 of the Act, 49 U.S.C. 4, is needed to cover those instances where the general increase might inadvertently result in violations of the "long-short haul"

provisions of that section, which in general prohibit a railroad from charging more in the aggregate for the transportation of the same commodity over a shorter segment of line than over a longer segment and from charging through rates exceeding the aggregate of intermediate rates (See App. 396a–397a).

The railroads' 1968 Petition to the Commission contained extensive allegations of increased costs and declining revenues and claimed, tracking the language of the statutory rule of rate making set forth in Section 15a(2), that:

> Without the increases in freight rates and charges now sought to be published, the railroads' earnings would be seriously inadequate to finance needed improvements and they would be insufficient for the maintenance of adequate, economical and efficient service and for the preservation of a national transportation system adequate to meet the needs of the commerce of the United States, of the postal service, and of the national defense, contrary to the objectives of the National Transportation Policy. [App. 321a–232a]

The accompanying Master Tariff X–259—though filed less than a month after the Commission had authorized another general freight increase[2] requested in 1967—provided for rate increases ranging from 3 to 10 percent on the various commodities.

After receiving affidavits from the railroads and parties opposing the proposed increases and after hearing oral argument, the Commission on June 19, 1968, or-

---

[2] Ex Parte No. 256, *Increased Freight Rates, 1967*, 329 I.C.C. 854; 332 I.C.C. 280.

dered a full-scale investigation into the lawfulness of the proposed rate increases under Section 15 of the Act; the investigation was denominated Ex Parte No. 259. In addition, as Section 15(7) permits, the Commission suspended the new tariff for a total of seven months pending completion of the investigation, stating, however, that it would allow the increases to go into effect temporarily to the extent they did not exceed 3 percent.[3] (App. 239a–242a.)

The Commission subsequently issued an order specifying procedures for the investigation and dividing it into two functionally distinct inquiries. The first and principal inquiry was an examination of the railroads' costs and revenue needs and the general level of rates; it bore the sub-investigation number Sub-No. 2. The second inquiry was an examination of the lawfulness of the increases in tariffs on particular categories of commodities, and it consisted of nine sub-investigations, numbered Sub-Nos. 3–11.[4]

The Commission held an exhaustive hearing in Sub-No. 2 on costs and revenue needs which lasted from September 9, 1968, to September 25, 1968. Every Class I railroad in the United States participated in this Sub-No. 2 hearing, as did 109 protestants, building a

[3] Accordingly, the railroads filed, effective June 24, 1968, a second master tariff, X–259A, which incorporated the permitted 3 percent increases for the duration of the suspension.

[4] Thus, for example, investigation Sub-No. 3 dealt with the new rates for carriage of coal, while Sub-No. 7 covered tariffs on a group of items ranging from woodpulp to textiles. See App. 243a–244a.

record over five thousand pages long.[6] The parties then fully briefed the issues involved in Sub-No. 2. On November 25, 1968, the Commission issued an interim report which contained its findings (App. 248a). That report found that the carriers had a critical need for additional revenue because of increased operating costs, and that, without the additional revenue to be obtained from the proposed general rate increase, they would be unable to provide adequate service (App. 274a–275a). The Commission further found that the general level of the rates proposed would not exceed a reasonable maximum and therefore approved it (App. 275a–276a).[7] Pursuant to this interim report, the Commission vacated its June 19 suspension order except as to certain commodities and gave appropriate authority for implementation of the new rates.

The Commission then went ahead with its subinvestigations into the rates and charges for the various commodity categories. On January 9, 1969, it issued its final report and orders. (App. 281a–398a). The final

[6] There were 1355 pages of verified statements submitted by the protestants, 1290 pages of verified statements submitted by the railroads, and 2429 pages of transcript of cross-examination; the total is 5074 pages.

[7] The Commission stated that this finding was without prejudice to different findings in regard to particular rates and charges when it concluded Sub-Nos. 3–11. It also noted that its "findings as to justness and reasonableness * * * will apply to the general bases of rates and charges," and asserted that it was not prescribing rates (App. 275a–276a).

report adopted and incorporated by reference the findings on costs and revenue needs and general rate level made in the interim report (App. 282a, 393a). Thus the Commission's "Ultimate Conclusions And Findings" repeated those of the interim report; in addition, they included findings approving and disapproving the reasonableness of the increases in tariffs for various classes of commodities on the basis of their effect on the movement of traffic and other factors (App. 392a, 393a). In its orders accompanying the final report, the Commission modified all of its outstanding rate orders that would otherwise prevent the railroads from charging the new rates, and authorized the carriers to depart from the long-short haul provisions of Section 4 to the extent necessary to put the new tariff into effect (App. 395a–396a). It also ordered the carriers to cease and desist " * * * from collecting basic rates increased to a greater extent than found just and reasonable herein * * * ." (App. 394a). Finally, it ordered the investigation discontinued (App. 395a). The Commission's opinion reiterated that it was not prescribing particular rates for specific commodities and route segments within the meaning of *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370,[8] and that the rates approved would be subject to case-by-case correction and to complaint and investigation in the normal manner at the instance of shippers (App. 393a).

---

[8] *Arizona Grocery* held in effect that a shipper cannot obtain reparations with respect to any rate prescribed by the Commission.

Appellants in the *Alabama Power* case (No. 106), a group of dissatisfied shippers who had participated in the proceedings before the Commission, immediately brought an action under 28 U.S.C. 1336(a) in the District Court for the District of Columbia, seeking to set aside the Commission's orders (App. 173a).[9] They focussed their attack upon the Commission's findings as to the railroads' costs and revenue needs and the reasonableness of the overall rate level, charging that the Commission's ultimate findings were not supported by the requisite subsidiary findings or by substantial evidence in the record, that the Commission had failed to consider certain relevant evidence and that it had not applied the required standards.[10] They did not, however, focus any attack upon the findings of the final report allocating rate increases among the various commodity categories. (App. 180a–181a). The Secretary of Agriculture, who had opposed the rate increase before the Commission, intervened pursuant to 7 U.S.C. 1291(b) and 28 U.S.C. 2323 on the side of the plaintiffs. The Class I railroads intervened as defendants, contending *inter alia* that the court lacked jurisdiction to review the orders. The Interstate Commerce Commission waived any jurisdictional defense and defended its decisions on the merits, while the United States took a neutral position.

[9] The same plaintiffs had earlier sued to set aside the November 25 interim order; hence their suit bears a "68" docket number. Upon issuance of the Commission's final report and orders, they subsequently amended their complaint to include the later report and orders. It was on the basis of this later pleading that the district court decided the case.

[10] Among other things, the complaint alleged that the Commission erred in not differentiating among the varying revenue needs of different railroads.

The three-judge district court,[11] dividing 2–1, held that it did not have jurisdiction to review the Commission general rate increase order and it dismissed the suit (App. 220a). Relying on *Algoma Coal and Coke Co.* v. *United States*, 11 F. Supp. 487 (E.D. Va.), the majority stated that plaintiffs' recourse was to attack particular rates before the Commission in Section 13 proceedings (App. 215a); it did not, however, decide or discuss whether the Commission's general findings on costs and revenue needs could be challenged by shippers in such Section 13 proceedings. Judge Wright, dissenting, thought that since the plaintiffs were attacking not particular rates but alleged overall deficiencies in the order which permitted a general rate increase, the court could review that order now. He observed that the Commission's action removed the prior ceiling on many prescribed rates, and as a direct result shippers were paying higher rates; he thus found the case ripe within the meaning of *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (App. 217a).

The *Atlantic City Electric* case (No. 78) began later than *Alabama Power* when several users of coal on February 28, 1969, brought suit in the District Court for the Southern District of New York to set aside the identical general rate increase orders (App. 3a). The complaint filed by these plaintiffs first attacked the general aspects of the Commission's proceedings, alleging generally that the Commission had permitted

[11] Wright and Tamm, Circuit Judges; Corcoran, District Judge.

the rate increases without adequate evidence in the record, had failed sufficiently to examine the justness and reasonableness of the increase, and had committed various procedural errors (App. 7a). It also specifically attacked the Commission's treatment of the proposed increase in rates for the transportation of coal, as an example of an alleged general failure to consider adequately the losses in rail traffic that the increases would cause and to make a proper allocation of rate increases among the various commodities in terms of the costs of carrying each category (App. 8a-9a). Several states (which are appellants here along with the original plaintiffs) intervened as plaintiffs, filing a complaint (App. 36a) which did not make the overall attacks upon the Commission's general findings and procedures but was directed, with considerably more specificity than the coal users' complaint, to the authorization of a 6 per cent increase in rates on grain and feed moving into the Northeast; thus, for example, the states alleged that approval of these rates was improper because of the "disproportionate contribution [of these commodities] to rail revenues" (App. 40a) and because the new rates "were unduly prejudicial of the Northeast and unduly preferential of the Southeast" (App. 41a).

As in *Alabama Power,* the Class I railroads intervened, asserting, *inter alia,* a lack of jurisdiction to review, and the United States again took a neutral position. This time the Commission took a different position on review because it construed the complaints as attacking only the increased rates on particular commodities; it argued that these claims—unlike the

more general claims asserted in *Alabama Power*—were not subject to direct review under a proper reading of the doctrine established in *Algoma, supra.*[12] The three-judge district court[13] unanimously agreed and dismissed the complaints (App. 160a, 164a). Its opinion conceded—in tacit disagreement with the Commission—that "on the face of the complaint, plaintiffs [the coal users] do challenge the entire order and the Commission's conduct of the entire proceeding, not merely the part of it which relates to coal." (App. 159a). Nonetheless the court held, relying on *Algoma* and cases following it, that the real grievance of the coal users and the states was with the higher rates on the particular commodities of interest to them, and this grievance was required to be asserted in proceedings under Sections 13 and 15. It concluded, therefore, that "the statute does not contemplate an attack upon the general revenue order at this stage" (App. 163a).[14]

---

[12] The Secretary of Agriculture is not a party in No. 78 and was not below.

[13] Kaufman, Circuit Judge; Bonsal and McLean, District Judges. This decision preceded the decision in *Alabama Power*, though the case began later.

[14] In a recent case decided by a different statutory three-judge panel of the District Court for the District of Columbia, the same result was reached. Plaintiff attacked the same order here in question, but only as it authorized increased rates on radio and television sets and electronic components. *Electronics Industries Association* v. *United States*, D. D.C., Civ. No. 1059–69, decided April 2, 1970. Notice of appeal to this Court was filed May 1, 1970, and the time for docketing has been extended to July 20, 1970.

398-980—70——3

The rate increase in question in the instant litigation has been followed by two other filings by the railroads looking toward additional rate increases. On October 16, 1969, the railroads proposed an additional increase averaging six per cent; after receiving briefs and oral arguments, the Commission on November 17, 1969, in a proceeding denominated Ex Parte No. 262, decided not to suspend and to allow the new rates to go into effect subject only to an investigation into matters of discrimination and preference. That order is under attack in *Manufacturing Chemists Assn., et al.* v. *United States, et al.*, D. D.C., No. 3276–69, in which proceedings have been suspended pending decision of the instant cases. On March 9, 1970, the railroads proposed a second subsequent increase averaging six per cent, and after briefing and argument the Commission ordered a partial suspension (generally, to the extent the increases exceed five per cent) and an investigation, That investigation, Ex Parte No. 265, is still in progress, having been initiated on May 27, 1970.[15]

The instant litigation involves, in practical terms, the shippers' right to refunds of the increased freight

[15] The Commission's allowance of a partial increase in its suspension order is under a very limited attack in *Great Lakes Ship Owners Assn., et al.* v. *United States, et al.*, D. D.C., No. 1736–70.

None of the Commission's orders relating to these additional rate increases is yet reported.

rates they paid under the 1968 increase. It also will have an evident impact on subsequent rate increases, both in establishing the availability of judicial review and, on the merits, in ultimately determining the validity of the foundation upon which the subsequent increases are based.

ARGUMENT

INTRODUCTION

Both courts below dismissed the complaints before them on the common theory that the orders in the Commission's general rate proceeding were not subject to direct judicial review, holding that judicial review would be available to shippers only after the completion of challenges to particular rates, in administrative proceedings under Sections 13 and 15(1) of the Interstate Commerce Act, 49 U.S.C. 13, 15(1), as "unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of [the Act] * * *", 49 U.S.C. 15(1). In *Alabama Power* (No. 106), the District Court for the District of Columbia did so despite the fact that it and all parties were in apparent agreement that the case involved only a challenge to the Commission's essentially separate Sub-No. 2 proceeding, in which the sole issue was whether the railroads' general revenue needs warranted an across-the-board nationwide rate increase; *Alabama Power* plainly involves no direct challenge to any particular rate. Although the Commission attempted to distinguish the controversy in *Atlantic City Electric* (No. 78) from that in *Alabama Power*

by arguing that the complaints raised not a general attack upon the revenue-needs decision but rather challenges to particular rates, the District Court for the Southern District of New York decided *Atlantic City Electric* upon the sweeping proposition that "the statute does not contemplate an attack upon the general revenue order at this stage" (*i.e.*, before the completion of further administrative proceedings under Sections 13 and 15) (App. 163a).

All three of the federal government parties on whose behalf this brief is filed are in agreement with the appellants in both cases that the courts below applied an erroneous principle in dismissing the cases before them. Specifically, all three agree that the plaintiffs in *Alabama Power* are entitled to immediate judicial review of the issue presented there—whether the Commission's findings on the railroads' costs and revenue needs and thus on the permissibility of the general increase in the level of rates in Sub-No. 2 were lawful and supported by substantial evidence. In *Atlantic City Electric*, however, there is some room for differing interpretations of the issues presented by the complaints of the coal-user plaintiffs and the intervening plaintiffs concerned with grain rates (all of whom are appellants here). The United States and the Commission (the only federal parties in No. 78, since the Secretary of Agriculture did not participate in the court below) are in agreement that the district court's theory of decision was, like that in *Alabama*

Power, erroneous; we believe that the Commission's orders were not *per se* unreviewable. However, the Commission believes that the complaint in *Atlantic City Electric* should have been dismissed, remaining of the view that the complaints in that case do not mount any general attack upon the revenue aspect of the Commission's decision but rather amount only to challenges of the manner in which the Commission treated rates on particular commodities; such matters, the Commission believes, must be administratively considered further in case-by-case challenges of particular rates on particular traffic segments before they will be ripe for judicial consideration. For reasons that will be detailed in part II of the Argument, the United States agrees with the Commission that the complaints in *Atlantic City Electric* do not state a claim for direct judicial review insofar as they challenge the Commission's preliminary treatment of the rates on particular commodities; the United States believes, however, that the district court properly viewed the complaints as attacking also the general revenue aspect of the Commission's decision, and therefore that the case should not have been dismissed altogether and should be remanded, like *Alabama Power*, for further proceedings on the merits. We suggest further, however, that in the event of a remand it would be appropriate for the New York court to stay its hand until the general issue has been decided by the District of Columbia court, where suit

was first filed, and for the latter court to allow the New York parties to participate.[16]

Because of this somewhat complex interrelationship of the two cases, we begin with a discussion of *Alabama Power,* discussing also *Atlantic City Electric* on the assumption that it presents the same issues as *Alabama Power.* In part II of the Argument, we proceed to an analysis of *Atlantic City Electric* as the United States and the Commission see it; both agree that it presents questions of judicial review not present in *Alabama Power,* as well as problems arising out of the fact that two courts have before them cases involving review of a single administrative proceeding.

SUMMARY

I

The complaint in *Alabama Power* focusses upon the Commission's final conclusions, following lengthy hearings, briefings and oral argument, upon the separate question of the railroads' revenue needs. Those conclusions are the indispensable foundation for the

[16] We take no position here on the merits of the Commission's action in any aspect of Ex Parte 259. Appellee railroads indicate that they will argue to this Court the merits of the Commission's action (Motion to Affirm, 19). This, however, is a matter for the district court, not for this Court at this time. Neither in *Alabama Power* nor in *Atlantic City Electric* did the district court express any opinion on the merits of the general rate order. In neither appeal did the appellants present the issue for decision by this Court. The record before the Commission was very long, and the issues are complex. In such circumstances the Court should not consider the merits of the general rate order until the district court has ruled upon them.

Commission's approval of the across-the-board increase in rates; they are based upon findings with respect to all of the railroads taken together, and involve no past or potential consideration of particular commodities or particular geographic areas. Each shipper has a direct interest in these conclusions, since, if they are wrong, the whole rate increase must be rolled back. The Commission has made it clear that its revenue decision is administratively final, and would not be considered further in any potential future proceeding challenging particular rates. Accordingly, the presumption in favor of judicial review of adverse agency action applies. *E.g., Abbott Laboratories* v. *Gardner,* 387 U.S. 136. Although the Commission's proceedings did result in certain orders giving the railroads affirmative relief from previously prescribed rates and the long-short haul restrictions of Section 4, we do not rely upon the formal nature of the Commission's action, since "[t]he technical form of the order is irrelevant", *City of Chicago* v. *United States,* 396 U.S. 162, 166. What is determinative is that the Commission has made a decision of the separable revenue questions that is administratively final in every practical sense.

The railroads argue that review is not now available because the shippers have allegedly not exhausted their administrative remedies by attacking the rates of interest to them in case-by-case proceedings under Sections 13 and 15(1) of the Interstate Commerce Act. But there is nothing in the statutory scheme that evidences any Congressional intent that such further administrative proceedings precede judicial review of

a final general revenue-need determination such as the Commission has made here, and the general doctrine of exhaustion of administrative remedies erects no barrier under the circumstances of this case. That doctrine is simply another aspect of the finality requirement, and it does not apply here because the Commission has fully considered and reconsidered the revenue questions; there is no premature interruption of the administrative process and no likelihood that the agency would itself give the general relief that the appellants seek. Proceedings under Sections 13 and 15(1) with respect to particular rates would in any event provide an inappropriate forum for consideration of general revenue needs and could add nothing to what the Commission has already done. Moreover, both shippers and railroads have a strong interest in knowing promptly whether the underpinnings of the general rate increase are sound or not: shippers because of the injury they suffer in paying excessive rates pending a final judicial decision and railroads because of the complexity of refunding excessive rate collections over an extended period. The district court decision many years ago in *Algoma Coal & Coke Co.* v. *United States,* 11 F. Supp. 487 (E.D. Va.), upon which the railroads and the courts below rely heavily, is outmoded except insofar as it stands for the proposition that particular rates increased under a general revenue order must be challenged under Sections 13 and 15 before judicial review is available.

Insofar as the railroads' objection to direct judicial review is based upon the specter of interlocutory relief

in favor of shippers pending such review it is without foundation. They overstate the likelihood that a general increase would be enjoined *pendente lite* under the accepted standards, which require a showing of irreparable injury, likelihood of success on the merits, public interest and lack of unacceptable harm to other parties. Moreover, the railroads' interests could be protected by conditions upon any stay. In any event, the railroads' arguments in this regard are irrelevant to the basic question whether judicial review should be allowed; they properly suggest only reasons why interim relief might not be given in particular cases as an incident to judicial review.

II

Insofar as the appellants in *Atlantic City Electric* attack the Commission's failure, in the general rate proceeding, to consider costs, revenue needs and rate of return on a commodity-by-commodity basis, the United States believes that they state a claim for judicial review similar to that stated in *Alabama Power*. However, much of the complaints in *Atlantic City Electric* amounts to an attack upon the manner in which the Commission made its preliminary allocation of the general increase among particular commodities and areas; the United States and the Commission both believe that those matters are not ripe for judicial review, and the Commission further believes that the attacks on the revenue findings in *Atlantic City Electric* fall into this same category. The challenges to the allocation of the rate increases involve questions of the effects of increased rates upon the

movement of traffic by rail, which cannot be decided without consideration of the circumstances peculiar to the various commodities and various geographical areas, and also involve questions as to whether particular rates are unreasonable or discriminatory. Such questions cannot appropriately be finally decided in a general proceeding relating to all rates throughout the country, and the Commission's consideration of them in the general rate proceeding was preliminary only. Thus, there has not yet been final agency action as to these matters, and final agency action must await the completion of particular proceedings under Sections 13 and 15(1), where further evidence relating to particular situations can be considered. This is not to say that the Commission's preliminary determinations in the general proceeding as to the allocation of the rate increases will not ultimately be reviewable to the extent that they are ultimately relied upon by the Commission. It is only to say that those preliminary determinations are not now ripe for review because they may well become irrelevant or be refined when the Commission considers particular rates in more specialized and detailed future proceedings under Sections 13 and 15(1). The fact that the appellants in *Atlantic City Electric* have generalized some of their objections by calling them objections to the methods followed in the Commission's preliminary consideration does not change the situation; any such procedural complaints unavoidably implicate the merits and may well disappear when the Commission considers the rates further in future proceedings.

III

If the Court agrees that *Alabama Power* and *Atlantic City Electric* should be remanded for consideration of the merits in whole or in part, it may find it appropriate to suggest some procedural guidelines for what will then amount to a new avenue of judicial review of general rate orders. These two cases involve review of the same Commission proceedings, and future general rate proceedings may well result in multiple review proceedings under the relatively unspecific statutes providing for review of ICC orders. In such future cases, consideration should be given to consolidation by transfers of venue under 28 U.S.C. 1404(a) or by staying all suits after the first. In the present circumstances, we believe that any further proceedings in *Atlantic City Electric* should await a decision in *Alabama Power*. In addition, the Court may wish to provide the district courts with guidelines for the grant or denial of stays pending review of general rate increases.

I. THE COMMISSION'S ENDORSEMENT OF THE GENERAL RATE LEVEL IS DIRECTLY REVIEWABLE

A. THE COMMISSION'S DECISION AS TO COSTS, REVENUE NEEDS AND THE REASONABLENESS OF THE GENERAL RATE LEVEL WAS FINAL AGENCY ACTION RIPE FOR JUDICIAL REVIEW

The complaint in *Alabama Power* sought review of certain of the "Ultimate Conclusions and Findings" in the Commission's "Final Report and Order" of January 9, 1969; the complaint quoted the findings

in question (which appear at App. 391a–393a) as follows (App. 181a–182a):

> 1. There is a critical need on the part of the respondent railroads for additional revenue to offset, in part, the increased operating costs not heretofore considered by us in approving their freight rates and charges. The public interest and that of the national defense, in a sound, adequate, and efficient transportation system will be adversely affected unless the proposed increased interstate freight rates and charges, subject to the limitations and exceptions set forth below, are permitted to be continued or to be put into effect.
>
> 2. Without the additional revenue to be derived from the increased freight rates and charges authorized herein, the earnings of respondents would be insufficient to enable them, under honest, economical, and efficient management, to provide adequate and efficient railway transportation service consistent with the public interest and the national transportation policy.
>
> 3. Respondents may justly and reasonably be permitted to continue and to establish the increased interstate freight rates and charges approved in our interim report * * * [with certain exceptions not relevant to the issue raised by this Amended and Supplemental Complaint]
>
> * * * * *
>
> 13. The increased freight rates and charges authorized herein will not exceed a maximum reasonable level, and the revenues derived therefrom will result in earnings and rates of return for the railways, as a whole and by the usual

> groupings, not in excess of that required to enable them to render adequate and efficient transportation at the lowest cost consistent with the furnishing of such service.

These findings were a largely verbatim reiteration of the findings set forth in the Interim Report and Order of November 25, 1968, in Sub-No. 2 (See App. 274a–275a, Findings 1–3) and, as we have noted, the Final Report expressly adopted the discussion of costs and revenue needs appearing in the Interim Report without further consideration (App. 282a).

As we have described, the railroads' costs and revenue needs were the subject of a full hearing that lasted two weeks. Dozens of parties participated, including all of the railroads and numerous representative shippers, building a record several thousand pages in length and exhaustively briefing these questions. The resulting Report went into a specific and detailed analysis of costs and revenues and carefully calculated rates of return, the result of which was a conclusive administrative determination that the general level of revenues sought by the railroads was reasonable and necessary for their continued effective operation. As the Interim and Final Reports clearly evidence, the Commission regards these matters as closed for the period covered and not subject to further reconsideration (except as may be necessitated by judicial review). Although any "maladjustments" in the various particular rates and charges were expressly left open for "correction" and all rates and charges were expressly left "subject to complaint and

investigation as provided by the act" (App. 276a, 393a), there was no such reservation as to these crucial underlying determinations, which are thus administratively final.

As the district court in *Atlantic City Electric* pointed out, "The general revenue order authorizing the overall increases is a necessary foundation or starting point for any subsequent determination of rates specifically applicable to plaintiffs" (App. 163a). But for the Commission's determination that the railroads had serious additional revenue needs, there would have been no rate increase, and if that determination was wrong, the general increase must be rolled back without consideration of the other matters discussed in the Final Report (Sub-Nos. 3–11) or any matters that might be raised by a particular shipper in challenging the rate on a particular commodity travelling over a particular segment. That is implicit in the rule of rate making, 49 U.S.C. 15a(2), which—read together with 49 U.S.C. 15(1) and (7)—required the Commission in the suspension proceeding before it to set aside any rate unjustified by railroad costs and revenue needs. Moreover, as the Commission's handling of the proceedings makes clear, the questions of overall need and reasonableness are distinctly severable from the question of how that overall increase should be allocated among the various commodities and whether or not a particular rate is fair or discriminatory. Ordinarily, it could not reasonably be contended that a particular rate increase, or even an increase on a particular commodity, is essen-

tial to provide the revenues needed by the railroads, since adequate additional revenues could be obtained from increases in the rates on other commodities or in other areas. Thus, the general revenue proceeding in Sub-No. 2 was both a necessary and a sufficient separate premise for the general increase.

While it might fortuitously happen that a particular shipper might have his particular rate increase wholly set aside on grounds of unreasonableness or discrimination unrelated to the general need for rate increases, it is evident that this would be extremely unlikely in any significant number of cases. Thus, each shipper has a direct interest in the Commission's determination that a general increase was justified; in the terms of administrative review, the shippers are directly aggrieved by the Commission's determination that rates may be increased, since no shipper would likely be paying more to ship what he ships to his particular destination unless the Commission had so determined.

In the light of these factors, we see no room for doubt that the Commission's across-the-board rate determinations are subject to direct and immediate judicial review, as the complaint in *Alabama Power* (and, on the United States' reading, the complaint in *Atlantic City Electric* in part) seeks. This Court reiterated last term in *City of Chicago* v. *United States*, 396 U.S. 162, 164, that:

> As stated in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140, we start with the presumption that aggrieved persons may obtain review of administrative decisions unless there is "per-

suasive reason to believe" that Congress had no such purpose.

See also, *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 156–157; *Barlow* v. *Collins*, 397 U.S. 159, 165–167. "It is * * * 'only upon a showing of "clear and convincing evidence" of a contrary legislative intent' that the courts should restrict access to judicial review" (*id.* at 167). Moreover, there can be no doubt of the ripeness of these across-the-board determinations for immediate judicial review. As we have shown, the direct impact of the Commission's action upon the shippers is plain: they pay higher rates every day because of it. Compare, *e.g.*, *Abbott Laboratories*, 387 U.S. 136, 152. And the Commission's decision as to the justifiability of increasing the general level of rail rates was final in the pragmatic sense in which such finality must be determined. *Id.* at 149–151; *Frozen Food Express* v. *United States*, 351 U.S. 40.

The district court in *Alabama Power* appears to suggest that the Commission's decision as to revenue needs is not reviewable because the resulting orders "are permissive and not mandatory" (App. 215a). But surely it is too late in the day to suggest that the affirmative or negative nature of agency action determines its reviewability; the railroads concede "such a position is not tenable today" (Motion to Affirm, p. 14). As the Court held in *City of Chicago, supra*, such a theory of decision "is of the vintage we discarded in *Rochester Telephone* [*Corp.* v. *United States*, 307 U.S. 125]", 396 U.S. at 167. Here, as in

City of Chicago, the Commission conducted a full-scale investigation on the basis of evidence, briefs and oral arguments presented to it by adversary parties and made a decision on the merits. As the Court there held, such a decision, if final, is reviewable agency action, and "[t]he technical form of the order is irrelevant". *Id.* at 166.[17] Nor is it any barrier to review of this decision that the orders implementing it, such as they were, also related to aspects of the Commission's consideration that may not (as we discuss in part II, *infra*) have been sufficiently final to be directly reviewable. The Administrative Procedure Act, in giving a right to review of "final agency action" (5 U.S.C. 702, 704), defines "agency action" as "the whole or a part of an agency * * * order, * * * relief, or the equivalent or denial thereof, or failure to act" (5 U.S.C. (Supp. IV) 551(13)). Thus, the only question is whether there is an isolable final agency decision, without regard to the technical form it may take. There was such a final decision here authorizing an increase in the overall rate level.

[17] Accordingly, although we note that the Commission's resolution of the general revenue proceeding did result in orders granting affirmative relief to the railroads with respect to rates previously prescribed by Commission orders and the long-short haul restrictions of Section 4 (see pp. 4–5, *supra*), we do not consider that determinative. In *City of Chicago* it was enough that the Commission issued an order discontinuing its investigation, and a similar order was also issued here (App. 395a).

B. THE STATUTORY SCHEME FOR CHALLENGING PARTICULAR RATES IS NO BAR TO DIRECT JUDICIAL REVIEW OF THIS ACROSS-THE-BOARD DECISION.

Despite these compelling indicia of readiness for immediate judicial review under familiar principles, the district courts below held—and the railroads argue—that the shippers' exclusive remedy is to go again to the Commission under Sections 13 and 15(1) with case-by-case attacks on the detailed rates affected by the new Master Tariff and to seek judicial review of the resulting administrative proceedings. The railroads' argument appears to come down to either or both of two positions: (1) the determination of railroad costs and revenue needs in the general revenue proceeding is fully reviewable, but only under cover of a Section 13 proceeding to attack a specific rate (Motion to Affirm, pp. 16, 17); or (2) that determination is not reviewable at all because "preliminary" or "general" or because it does not impinge on any "legal interests" (Motion to Affirm, p. 15). The railroads have not thus far chosen between these two inconsistent arguments, and the majority in *Alabama Power* did not analyze the problem to the extent of expressing either proposition; the district court in *Atlantic City Electric* quite clearly chose the first proposition, stating that the plaintiffs could preserve their objections to the general revenue

order and have them judicially reviewed if the Commission again rejects them in a Section 13 proceeding (App. 163a).

The second of these two propositions—that the determination of the proper overall level of rates is not reviewable at all—is answered by what we have already said,[18] and accordingly we now turn to the first, which amounts to a contention that the shippers have not exhausted their statutory remedies before the agency and so should be denied judicial review even though the determination they attack is final and otherwise ripe under general principles.

At the outset, we note that the railroads and the courts below have pointed to nothing in the statute or in its legislative history that directly discourages prompt judicial review in these circumstances. Nor are we aware of any special indication that Congress has intended that proceedings under Sections 13 and 15(1) should be the exclusive path for seeking review of a Commission determination made, as here, in a rate suspension proceeding under Section 15(7). Thus, the railroads' argument must depend entirely upon general concepts of exhaustion of administrative remedies in the interest of orderly procedure.

This Court recently had occasion to discuss extensively the considerations of policy which underlie the

[18] We observe further, as did Judge Wright in dissent, that by analogy *United States* v. *Louisiana*, 290 U.S. 70, stands for the proposition that a general rate increase order is subject to judicial review (App. 217a). That case involved review of a Commission order setting intrastate rates under Section 13(4) of the Act.

doctrine of exhaustion of administrative remedies. *McKart* v. *United States*, 395 U.S. 185. The Court stated that "[a] primary purpose is, of course, the avoidance of premature interruption of the administrative process." *Id.* at 193; see also, *Abbott Laboratories, supra*, 387 U.S. at 138. This permits the agency fully to develop the facts, apply its expertise and exercise discretion before it has to answer to a court: In addition, the Court pointed out that "[c]ertain very practical notions of judicial efficiency come into play as well." *Id.* at 195. The complainant may achieve the relief he wants before the agency and thus spare a court the need to hear the case; also, "notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors." *Id.* at 195. In short, the principle of exhaustion of administrative remedies is nothing more than an aspect of the requirement of finality—admonishing that the courts should not intrude until the agency, in pragmatic terms, has definitively decided the matter sought to be reviewed. It is not a mechanical requirement that every theoretically available administrative procedure must be tried even after the agency has made it plain that its decision is final.[18a]

[18a] The Administrative Procedure Act explicitly so states: "Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of [judicial review] whether or not there has been presented or determined an application * * * for any form of reconsiderations * * *" (5 U.S.C. (Supp. IV) 704). There is no need to exhaust an administrative remedy which is sure to prove useless. Cf. *City Bank* v. *Schnader*, 291 U.S. 24; also *Gully* v. *Interstate Natural Gas Co.*, 82 F. 2d 145 (C.A. 5), certiorari denied, 298 U.S. 688.

None of the considerations that might call for further resort to the agency are present with respect to the Commission's approval of an increased general rate level. The matters in question—the railroads' costs and revenue needs—were a separate issue considered by the Commission in a separate subproceeding that is now complete. The decision—whether lawful and supported by substantial evidence or not—was the result of a full, lengthy hearing devoted specifically to these matters, and the Commission had ample "chance to discover and correct its own errors." It first issued its disputed findings in the interim report of November 25, 1968. Several shippers who had participated in the proceedings petitioned for reconsideration of the interim report. Yet the Commission in its final report of January 9, 1969, completely reaffirmed the findings on costs, revenue needs and general rate level which it had made in the interim report (App. 282a, 391a, 393a). Thus, there can be no doubt that the administrative process is in practical terms complete with respect to these matters and that judicial review will not result in any "premature interruption."

Because the challenged administrative action is final, there is good sense to the position which the Commission apparently took in *Koppers Co., Inc.* v. *Chesapeake & O. Ry. Co.*, 303 I.C.C. 383, 387: that in a Section 13 challenge to a particular rate the Commission will not hear a contention that the underlying general revenue order was not adequately supported

by the evidence.[19] This only emphasizes the appropriateness of direct judicial review of such an order. The fact, cited by the appellee railroads (Motion to Affirm, 16), that in some Section 13 cases involving particular rates the Commission has looked into the costs and revenue yields of particular service is simply irrelevant to the question of prompt review of Commission findings made in a general revenue proceeding on the costs and revenue needs of the nation's railroads taken as a whole and on the general level of rates.[20]

---

[19] This Commission decision was a sequel to the district court opinion in *Koppers Company* v. *United States*, 132 F. Supp. 159 (W.D. Pa.), p. 37, n. 22, *infra*.

[20] In none of the Section 13 cases cited by appellees is there any indication that the parties challenged or that the Commission considered the validity of findings on costs and revenue needs entered in a prior general revenue proceeding. In *Rochester & Pittsburgh Coal Co.* v. *Baltimore & Ohio*, 294 I.C.C. 423 (1955), the only costs in issue were the costs of carrying coal between the Reynoldsville District of Pennsylvania and Buffalo; nobody contested the lawfulness of any findings entered in any general revenue proceedings. *Avera Packing Co.* v. *Atlantic Coast Line R. Co.*, 296 I.C.C. 17 (1955), was a dispute between shippers and carriers over the proper rate for the carriage of hogs from East St. Louis to points in the southeast; the Commission did not even mention any general rate increase except to state that the hog rates set in 1942, as subsequently increased as a result of general rate increases, were still just and reasonable. In *Baltimore & O. R. Co.* v. *Chicago & E.I.R. Co.*, 318 I.C.C. 771 (1963), reversed on reconsideration, 322 I.C.C. 572 (1964), a group of railroads contested another railroad's ex-river rail rate on bituminous coal between Mt. Vernon, Indiana, and Chicago; the costs in issue were the cost of the Mt. Vernon-Chicago service, and the parties—all rail-

If the Commission—as the railroads seem to suggest it should—were to reconsider its general cost and revenue findings in individual Section 13 cases, the result would be, as Judge Wright's dissent observed "* * * needless relitigation of the same issue before the Commission in countless rate-making proceedings involving individual commodities" (App. 217a–218a). Thus every Section 13 case might risk becoming a truncated and inadequate general revenue proceeding, as shippers again and again litigated issues which the Commission had already determined in the prior general revenue proceeding. Under such circumstances, the Commission as a practical matter could do no more than reaffirm its earlier determinations. It would lead to unconscionable uncertainty if, after the extensive consideration the Commission had already given to these general questions, it were to reopen them in the narrow context of disputes over particular rates in particular areas.

Because the general revenue and rate-level determinations are the common underpinning for the existence of each of the various particular rate increases that have taken effect, there are strong practical reasons why the propriety of those determinations should be judicially reviewed, once and for all, as soon as possible. The considerations here are the same as

roads and all beneficiaries of general rate increase orders—never challenged the general rate increase orders.

These cases do show, however, that in Section 13 proceedings where shippers challenge a rate or group of rates as unjust, unreasonable or unjustly discriminatory, the Commission treats the lawfulness of the general rate level as already established by its general rate increase orders.

those that induced the railroads to request and the Commission to give expedited administrative consideration to these general matters. As we have noted, inflationary pressures in recent months have resulted in two general rate increase proposals since the one here in question (p. 13, *supra*); under such conditions both shippers and carriers have an evident interest in a prompt final decision on the lawfulness of each of those increases. Among other things, the longer the delay the greater is the injury to shippers who may have been forced to advance funds, through higher rates, that they were in fact entitled to keep and the greater is the complexity of the accounting processes involved in making refunds. And, as we have shown, there is neither a legal nor a practical reason why such final judicial decision should be delayed.

The decisions of both courts below relied heavily—and largely uncritically—upon the 1935 district court decision in *Algoma Coal and Coke Co.* v. *United States*, 11 F. Supp. 487 (E.D.Va.) as being dispositive of these cases. These cases are, however, significantly different from *Algoma* (considering *Atlantic City Electric*, as we do throughout this part of the argument, only insofar as it attacks the decision as to the general rate level), and some aspects of that decision are highly dubious in the light of more recent developments in the law.

The plaintiffs in *Algoma*, producers of coal, sought review of a general rate order which had, among other things, authorized an increase in the rate for

coal. The plaintiffs objected specifically to the new, higher rate on coal. Thus the court stated: "The object of this proceeding is to enjoin putting these increased rates into effect, so far as they apply to the plaintiffs." *Id.* at 491.[21] The plaintiffs argued that the new coal rates would prejudicially affect the coal industry and render coal incapable of competing effectively with rival fuels. *Id.* at 492. The court dismissed the bill on the ground that plaintiffs lacked "status" to bring it and advised the coal producers to exercise their remedies under Sections 13 and 15 of the Act. *Id.* at 495, 496. Significantly, while the district court dismissed the suit on jurisdictional grounds, it did so only after review and approval of the Commission's action on the merits. *Id.* at 494–495.

Algoma thus properly stands for the important but limited proposition that a shipper may attack in court particular rates increased under a general rate order only after filing a complaint pursuant to Sections 13 and 15 of the Act challenging those rates as not just and reasonable. However, we are not here concerned with the kind of challenge which the court in *Algoma* had dismissed. The issue here is not particular rates but the Commission's alleged failure to make adequate findings on costs and revenues in support of the authorization to raise rates generally. *Algoma* as precedent does not bar judicial review in such a situation

[21] While plaintiffs did make some allegations which could be read as an attack on the general rate increase order because of insufficient findings as to the carriers' costs and revenue needs, *id.* at 492, the court read the bill as a contention that the Commission had "determined or fixed particular rates for the plaintiffs particular traffic." *Id.* at 496.

and the courts below erred to hold that it was a bar.

To the extent that *Algoma* may be said to support any holding about reviewability broader than the proposition stated above, it should be disapproved as a precedent. The district court's opinion was permeated with the now discarded notion that because agency action is permissive, it is not subject to review; indeed the court characterized the Commission's action as "* * * merely to permit the railroads to initiate new rates." *Id.* at 493. This was not only an inaccurate description of what the Commission had done; but was an expression of a theory of judicial review "of the vintage we discarded in *Rochester Telephone.*" *City of Chicago v. United States, supra,* 396 U.S. at 167.[22]

[22] As noted, the district courts in both *Alabama Power* and *Atlantic City Electric* relied principally upon *Algoma.* The two other cases cited below offer no reasons to affirm the district courts here. *Koppers Co.* v. *United States*, 132 F. Supp. 159 (W.D. Pa.) was an effort by a coal user to obtain immediate review of that part of a general rate order which authorized a cheaper rate on the shipment of coal from the Southern Mines to Hampton Roads when destined for New England than when destined for New Jersey and Pennsylvania. The court dismissed the case because the plaintiff had not exhausted its administrative remedy. *Florida Citrus Commission* v. *United States*, 144 F. Supp. 517 (N.D. Fla.), affirmed *per curiam*, 352 U.S. 1021, involved an attempt to get immediate review of a general increase in which the Commission had authorized allegedly discriminatory refrigeration charges. The court dismissed for failure first to pursue Section 13 proceedings, but it did so only after deciding on the merits that the Commission's action was justified. On appeal the parties reargued the merits, and this Court affirmed. In each case the gravamen of plaintiff's complaint was discriminatory conduct by carriers under authorization of a Commission order; and in each case the court required an exhaustion of administrative

C. THE POSSIBILITY THAT INTERLOCUTORY RELIEF MIGHT BE GIVEN PENDING JUDICIAL REVIEW IS NO REASON FOR DENIAL OF REVIEW; ANY SUCH RELIEF SHOULD BE GIVEN SPARINGLY AND IN SUCH A MANNER AS TO PROTECT THE INTERESTS OF BOTH RAILROADS AND SHIPPERS

Insofar as the railroads object to direct review of the general revenue order on the ground that it would carry with it an unacceptable risk of an interlocutory injunction prohibiting the increased rates from taking effect, they raise a largely hypothetical and strictly irrelevant specter. The possibility of interlocutory relief is a normal incident of judicial review, and the statutes governing review of Interstate Commerce Commission orders contemplate that it will be available in appropriate circumstances "[o]n such conditions as may be required and to the extent necessary to prevent irreparable injury". 5 U.S.C. 705; 28 U.S.C. 2324, 2325, 2284(3). But the possibility that this incidental power may be abused, or should not be used in certain circumstances, is no support for any argument that the judicial power to review is lacking or should not be exercised. It is simply the basis for an argument that interlocutory relief should not be granted in particular cases. See *Abbott Laboratories* v. *Gardner*, *supra*, 387 U.S. at 155–156.

The railroads greatly overstate the possibility that a district court would enjoin a general rate increase *pendente lite*. An interlocutory injunction could be granted only by a three judge court; a single judge

---

remedies. These holdings are consistent with our position in this case that Commission findings on the railroads' costs and revenue needs and the general level of rates made in a general revenue proceeding ought to be immediately reviewable.

may grant a temporary restraining order only until the three-judge court can pass upon the application for an interlocutory injunction, and only upon a "specific finding * * * that specified irreparable damage will result if the order is not granted." 28 U.S.C. 2284(3). A temporary restraining order is "a drastic remedy" that requires a strong showing, *Stott* v. *United States*, 154 F.Supp. 389, 391 (S.D.N.Y.); *Braswell Motor Freight, Inc.* v. *United States*, 297 F.Supp. 215 (S.D.Miss.). And similarly stringent standards would govern any interlocutory injunction, including the specific requirement of irreparable injury set forth in the Administrative Procedure Act, 5 U.S.C. 705, and the need for a showing that the suit for review would be likely to succeed on the merits and that a stay would not cause unacceptable harm to other parties and would be in the public interest. *Virginia Petroleum Jobbers Ass'n* v. *Federal Power Commission*, 259 F.2d 921, 925 (C.A.D.C.). Under these stringent criteria, we think it unlikely that a rail freight general revenue order would be restrained pending judicial review under existing economic conditions.[23] Such temporary relief was denied in *Alabama Power* and in *Manufacturing Chemists Association* v. *United States*, *supra* p. 14.

[23] In the present case, the railroads estimated before the Commission that their proposed rate increase would produce increased revenue of $466.2 million—some $89.2 million short of annual revenue needed simply to cover their increased expenses. App. 265a, 332 I.C.C. at 602. The total income of the Class I railroads in 1968 was $542.2 million and their rate of return on net investment was estimated to be 2.58 percent. App. 267a, 332 I.C.C. at 612. Thus each month of delay in a rate increase would be very costly, with perhaps as much as $40 million per month in revenue lost.

Even if a rate increase were temporarily enjoined, the district court would be further required to consider appropriate conditions to such a stay of the Commission's action. An appropriate condition—if there were any stay at all—might be a requirement that shippers pay the increased rates into a fund under the control of the court, which the court could then order disbursed to the shippers or the railroads depending upon the outcome of the suit. Compare *Federal Power Commission* v. *Interstate Natural Gas Co.*, 336 U.S. 577. While the feasibility and mechanics of such an arrangement would require careful district court consideration in any particular case, it might well be preferable to imposing upon shippers the burden of collecting reparations from the railroads in a case where their likelihood of success was relatively strong. And it would obviate the railroads' contention that they would have no redress if a stay pending an unsuccessful suit prohibited collection of the higher rates approved by the Commission.

II. THE COMMISSION'S CONSIDERATION OF THE ALLOCATION OF THE GENERAL RATE INCREASE AMONG COMMODITIES WAS NOT SUFFICIENTLY FINAL TO WARRANT JUDICIAL REVIEW AT THE PRESENT TIME.

After determining in its Sub-No. 2 proceedings that the railroads were entitled to an increase in revenue of the overall magnitude proposed, the Commission went on to consider, in Sub-Nos. 3–11, the lawfulness of the varying increases in the rates for particular categories of commodities that would make up the overall increase. In this part of the investigation, the

Commission focussed largely upon the first of the three clauses of the rule of rate making—"the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed", 49 U.S.C. 15a(2)[24]—and it concluded, with certain exceptions for which it provided, that the various increases proposed were in general consistent with this criterion. The Commission did not, however, purport to apply this criterion definitively to particular rates, noting that denial of increases on particular commodities on the ground, asserted by various shippers, that they would be self-defeating (by drying up traffic or causing its diversion to other modes) "would require evidential support more reliable and persuasive than has been provided *in this record*" (App. 285a; emphasis added). And, for example, in dealing with the contentions made in this regard with respect to coal, the Commission pointed out that "Should competitive situations arise, appropriate adjustments can be made by producers and carriers" (A. 310a). In addition, without purporting to be comprehensive, the Final Report dealt with various more particular matters, finding that certain of the proposed increases in rates and related charges would be unreasonable or discriminatory and directing that they be modified (see Findings 5–12, App. 392a–393a). Speaking generally, the Commission took pains to point out that

[24] The other two clauses of Section 15a(2) relate to the costs and revenue needs that were considered in Sub-No. 2. The Interim Report discussed this first clause only in a preliminary and very general way (App. 273a–274a).

> * * * [O]ur conclusions herein do not require that any respondent increase its rates by any particular amount nor, except as specifically provided herein, do they preclude variability of application, provided increases do not exceed those allowed. We do not herein purport to determine whether the particular rates which result from the increases are maximum reasonable rates, nor does our order constitute a prescription of rates within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370. [App. 283a.]

As we have noted, the complaint in *Alabama Power* did not focus on these findings relating to the effect of the increases upon the movement of particular commodities and the reasonableness of particular rates and charges; rather, its attack was on the underlying findings, appearing primarily in the Interim Report, that the railroads' needs justified a general increase. The United States reads the complaint of the original plaintiffs in *Atlantic City Electric* (the coal users) as including in part a similarly reviewable attack upon the Commission's conclusive treatment of the railroads' costs and revenue needs. Thus, in paragraphs 12 and 14 of their complaint, the coal users complained that the Commission considered "no evidence as to the present cost to the railroads for providing the transportation services involved with respect to any commodity" (App. 8a) and that the increase in coal rates

> * * * was permitted in the face of substantial and uncontroverted evidence that coal traffic, prior to such increase, produced a disproportionate return to the carriers over and

> above the costs to them of providing that service. The order, in determining that cost of service for a commodity group or movement is an irrelevant factor in a rate proceeding, has merely established the test of "what the market can bear" as the governing principle herein and, as set forth above, has then proceeded to abdicate to the carriers the ICC's statutory function of determining just, reasonable and non-discriminatory rates. [App. 9a.]

The United States interprets these allegations as amounting to a general objection that the Commission misapprehended the issue as to revenue needs and should have considered the railroads' needs commodity by commodity rather than in gross.[25] In the view of the United States, such an objection falls within the category discussed in part I of the Argument and therefore is subject to direct judicial review. The Commission disagrees, viewing these allegations as attacks upon the particular coal rates, and thus of the same nature as the further allegations that we discuss in the next paragraph.

---

[25] The complaint appears to be referring in this regard to the discussion in the Final Report (App. 284a and 285a) concerning the significance of the costs and contributions to revenue from the carriage of particular commodities; the Commission there stated the general conclusions that "rates substantially in excess of full costs do not necessarily exceed a maximum reasonable level" and that "[c]osts of specific commodity movements are not in issue" (App. 285a). The United States reads the *Atlantic City Electric* complaint as attacking these general propositions. It should be clear that the line between what is reviewable directly and what is not depends upon the nature of the issue and not which Report discusses it.

The remaining allegations of the coal users' complaint in *Atlantic City Electric* must, in the view of the Commission and the United States, be read as attacks upon the reasonableness of particular rates and the effect of the increases in such rates upon the movement of traffic in the commodities affected. Thus, the coal users complained, *inter alia*, that the Commission

> * * * allowed these increased freight rates to be put into effect with no evidence in the record to rebut the voluminous, specific and detailed evidence presented by shippers, including plaintiffs, that substantial loss of traffic would result from the proposed increases. [App. 8a.]

They also asserted that the Commission's proceedings were procedurally defective (App. 7a). The complaint of the intervening states in *Atlantic City Electric* was directed largely to rather specific objections to the increased rates on grain moving to the Northeast (p. 11, *supra*).

The Commission and the United States are in agreement that these remaining allegations in *Atlantic City Electric* do not state claims warranting direct judicial review because the administrative action attacked does not have the requisite degree of practical finality. In contrast to the question of what the railroads need in the aggregate, the questions here necessarily relate to what particular shippers or groups of shippers are willing to pay (rather than decide not to ship by rail or not to ship at all) and what those shippers can equitably be required to pay (in light of the principle that rates and charges are not to be "unjustly discriminatory or unduly preferential or prejudicial,"

49 U.S.C. 15(1)). These narrower questions cannot be finally answered by the Commission until it has considered the rates on particular commodities between particular points, as Sections 13 and 15(1) will permit it to do subsequently; by the nature of the problem, the final answers will vary from shipper to shipper, from commodity to commodity and from area to area. Accordingly, although the Commission dealt to some extent with these matters in the general rate proceeding, it did so—as we have described—in a preliminary and uncomprehensive way, looking toward further particularization in proceedings under Sections 13 and 15(1).[26]

We do not, of course, question the ultimate reviewability of what the Commission has done in these areas in the general rate proceeding; to the extent that the Commission may rely upon it in further proceedings under Sections 13 and 15 it will be reviewable then.[27] But since the Commission will consider more

[26] Of course, such proceedings can be grouped in whatever matter will be most appropriate in light of the issues raised. Thus, for example, all coal shippers in a relevant area could initiate a joint proceeding to consider diversion. But a joint proceeding involving coal and grain would probably not make sense; certainly, it seems to us that a joint proceeding involving all commodities throughout the country would be unmanageable if it tried to consider all pertinent matters definitively. The Commission did not have such a proceeding before it when authorizing the general rate increase.

[27] The Administrative Procedure Act provides that "A preliminary, procedural, or intermediate agency action not directly reviewable is subject to review on the review of the final agency action." 5 U.S.C. 704. Thus, there will be no hiatus in what is subject to review at an appropriate time.

detailed evidence with respect to more specific situations brought before it, the preliminary findings that were made in the general rate proceeding may well be inapplicable or require refinement in any such specific situation, such as those raised here by those interested in coal and grain rates. Thus, there remains a meaningful administrative remedy that has not been exhausted, and, if the courts were to intrude at this juncture they would indeed be "entangling themselves in abstract disagreements over administrative policies", for, although we acknowledge the effect of the rate increases upon shippers (p. 27, *supra*), there would be "judicial interference [before] an administrative decision has been formalized". *Abbott Laboratories* v. *Gardner, supra,* 387 U.S. at 148. In the language of *McKart* v. *United States, supra,* 395 U.S. at 195, a shipper unhappy with the share of the railroads' increased revenues that is contributed by his shipments of coal "may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene." As we showed in part I, there is in practical terms no further administrative recourse as to the across-the-board revenue issues; there is, however, as to the manner in which those increased revenues are derived from shipments of various commodities.

It is not determinative that the coal and grain interests that have sued in *Atlantic City Electric* have generalized some of their objections to the Commision's preliminary findings on diversion and discrimination by framing them as attacks on the procedure or meth-

odology followed in Sub. Nos. 3–11 of the general rate proceeding. Indeed, it is likely that many of their objections to the kind of evidence the Commission relied on in its preliminary conclusions will evaporate when the Commission considers further detailed evidence in more specialized proceedings under Sections 13 and 15(1). Even if it could be said that the procedures or methods attacked are common to the Commission's consideration of all of the various commodities, the issues thus raised are inevitably intertwined with the merits and cannot be meaningfully abstracted. It would be another matter if the objection were the sweeping one that the Commission could not make any findings of any kind on rate allocations in the general rate proceeding unless it considered all the matters as to each and every rate that it would consider in full-scale proceedings challenging each rate; then, the shipper would be attacking the very concept of a general rate proceeding that does not fully prescribe rates in the technical sense, and that broad-scale objection to the procedure used by the Commission would be directly reviewable. But we do not understand the plaintiffs in *Atlantic City Electric* to make that broad contention, and doubt that it would seriously be made by any shipper.[28] See *United States* v. *Louisiana*, 290 U.S. 70.

---

[28] It is not necessary to reach in this case the question, suggested by the appellants in *Atlantic City Electric*, of what the burden of proof might be as to the various further issues that might be considered in proceedings under Sections 13 and 15(1) before the Commission finally determines the just and reasonable rates for particular commodities, in particular areas. For purposes of judicial review—the only question here—it is suffi-

III. PROCEDURAL CONSIDERATIONS

The confluence of the *Alabama Power* and *Atlantic City Electric* cases illustrates a problem that is inherent in the relatively unspecific statutory scheme for review of orders of the Interstate Commerce Commission. With respect to agency orders reviewed in the courts of appeals, the Judicial Code expressly provides that if proceedings to review the same order have been filed in two or more courts, the agency record will be filed in the court where proceedings were first begun and proceedings begun in any other court will be transferred to the first court. 28 U.S.C. 2112(a). There is, however, no similar statutory provision for consolidation of judicial review proceedings properly taken to the district courts, such as proceedings to review orders of the Commission. The result has been that in this instance separate proceedings to review the same agency action have been taking place in the

---

cient to note the obvious proposition that to the extent any Commission finding in the general proceeding remains pertinent to any such final determination, and thus is subject to judicial review thereafter, the reviewing court will review such finding in the terms in which the Commission made it; there will be no change in the burden of proof as to that finding. To the extent that the burden of proof may change as to additional matters considered in the further administrative proceedings (a matter that will be subject to judicial review thereafter), the answer to any general objection is simply that the Commission's determination to have a general proceeding as to some matters did not give shippers a vested right to have the burden of proof in that proceeding apply to all matters pertinent to a particular rate. Otherwise, the Commission would in effect be denied its basic discretion to order its proceedings in whatever reasonable, manner appears most appropriate in its informed judgment.

district courts for the District of Columbia and the Southern District of New York; in future cases involving general revenue orders there may well be even more courts involved, especially in view of the fact that there is no statute of limitations with respect to review of Commission orders. Since acceptance of the appellants' positions in the instant cases would in practical terms amount to the establishment of a new kind of ICC review proceeding with broad geographic application, the Court may in that event wish to suggest to the district courts procedures that will prevent potentially disorderly review situations from occuring.

This Court considered the problem of multiple district court suits reviewing agency action in *Abbott Laboratories* v. *Gardner, supra,* 387 U.S. at 154–155, pointing out that "the courts are well equipped to deal with such eventualities," *inter alia,* by use of the venue transfer provision, 28 U.S.C. 1404(a), or by staying subsequent suits pending the conclusion of a primary suit. The Court also considered a somewhat similar problem in its recent decision in the *New Haven Inclusion Cases,* Nos. 914 *et seq.,* 1969 Term, decided June 29, 1970; there, the Court directed one of the district courts involved to stay its hand pending the completion of action by another.

If the Court agrees with us that the judgments of both district courts in the instant cases should be reversed, we believe that it would be appropriate to direct the New York district court to stay further proceedings in *Atlantic City Electric* pending completion of the District of Columbia district court's consideration of the merits of the *Alabama Power* case, which

was filed first and might render *Atlantic City Electric* substantially moot if the plaintiffs are given the relief they request. It would appear appropriate to allow the plaintiffs in *Atlantic City Electric* to appear as *amici curiae* in *Alabama Power* on remand, and perhaps to permit them to intervene as parties; however, the latter determination would best await the filing of a motion to intervene by those parties, if they are so disposed, so that the district court could consider the nature of the claims that they might wish to present. Although in some future situations it might be the best course for all suits to be consolidated in a single district court by transfer of venue, we hesitate to suggest that at this stage of these cases since, depending upon this Court's decision as to the scope of review, the New York case may well involve issues quite distinct from those in the District of Columbia case.[29] Thus, we think that the details of the manner in which these two cases can most efficiently be handled should be worked out by the parties and the district courts involved, subject only to the general principle that proceedings in New York should await the conclusion of proceedings in the District of Columbia.

In addition, it might be appropriate for this Court's opinion—assuming reversals—to set forth general guidelines for the grant or denial of interlocutory relief pending judicial review of ICC general revenue

---

[29] Of course, it should be open to the parties in both cases freely to amend their complaints in the light of this Court's decision.

orders, along the lines that we have discussed earlier (pp. 38–40, *supra*).

CONCLUSION

For the reasons stated, the judgments of the district courts should be reversed and the causes remanded for further proceedings.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

RICHARD W. MCLAREN,
Assistant Attorney General.

JAMES VANR. SPRINGER,
Deputy Solicitor General.

HOWARD E. SHAPIRO,
ROBERT B. NICHOLSON,
Attorneys.

EDWARD M. SHULMAN,
General Counsel,
WILLIAM A. IMHOF,
Attorney,
Department of Agriculture.
ROBERT W. GINNANE,
General Counsel,
ARTHUR J. CERRA,
Associate General Counsel,
Interstate Commerce Commission.

JULY 1970.

APPENDIX

STATUTES INVOLVED

1. Administrative Procedure Act, as revised, 5 U.S.C. (Supp. IV):

§ 551. Definitions.

* * * * * *

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

§ 701. Application; definitions.

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

* * * * * *

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

§ 702. Right of review.

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

§ 704. Actions reviewable.

Agency action made reviewable by statute and final agency action for which there is no other adequate

remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

§ 705. Relief pending review.

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

2. Judicial Code, 28 U.S.C.:

§ 1336. Interstate Commerce Commission's orders.

(a) Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

* * * * *

§ 2324. Stay of Commissioner's order.

The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Com-

merce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action.

§ 2325. Injunction; three-judge court required.

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

§ 2284. Three-judge district court; composition; procedure.

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

* * * * *

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

* * * * *

3. Interstate Commerce Act, as amended, 49 U.S.C. 151, *et seq.*:

§ 13. Complaints to and investigations by Commission.

(1) Complaint to Commission of violation of law by carrier; reparation; investigation.

Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. [49 U.S.C. 13]

* * * * *

§ 15. Determination of rates, routes, etc.; routing of traffic; disclosures, etc.

(1) Commission empowered to determine and prescribe rates, classifications, etc.

Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate,

fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

* * * * *

(7) Commission to determine lawfulness of new rates; suspension; refunds.

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had

become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

* * * * *

[49 U.S.C. 15(1), (7)]

§ 15a. Fair return for carriers.

(1) When used in this section, the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

[49 U.S.C. 15a(1), (2)]

U.S. GOVERNMENT PRINTING OFFICE: 1978